Supreme Court
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No. 93-1314

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LASZLO N. TAUBER, M.D.,
Petitioner,

v.

SALOMON FOREX INC, SALOMON INC, SALOMON BROTHERS INC, AND FRED GATLING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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March 17, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

36 pp

QUESTION PRESENTED

Respondents adopt the court of appeals' statement of the issue presented by this case (Pet. App. 2a):

"[W]hether professional traders may individually negotiate sales of foreign currency futures and options off organized exchanges without violating the Commodities Exchange Act" ("CEA") by reason of the "Treasury Amendment," which provides that "[n]othing in [the CEA] shall be deemed to govern or in any way be applicable to transactions in foreign currency, . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii).

RULE 29.1 LISTING

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties.

Salomon Forex Inc is a wholly owned subsidiary of Salomon Brothers Holding Company Inc, which is itself a wholly owned subsidiary of Salomon Inc.

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Salomon Inc is a publicly held corporation. For a full listing of Salomon Inc's subsidiaries, *see* p. 5a.

Fred Gatling is vice president of Salomon Brothers Inc.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 8 F.3d 966. One of the opinions of the district court (Pet. App. 27a-44a) is reported at 795 F. Supp. 768.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1993. (Pet. App. 2a.) A timely petition for rehearing was denied on November 17, 1993. (Pet. App. 55a-56a.) The petition for a writ of certiorari was filed on February 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner mischaracterizes this case in four respects. *First*, it does *not* "involve[] *trading in* options and futures contracts." (Pet. 2, emphasis added.) The contracts here were never "traded"—either on an exchange or with other parties. The case actually involves options and futures contracts that were privately negotiated between petitioner and respondent, two professional foreign currency traders. Their transactions were part of the billions of dollars' worth of "off-exchange" foreign currency futures and options contracts that are negotiated every day among professional traders and dealers.

Second, the case does not present a question of "staggering" practical impact. (Pet. 14.) Far from "deregulat[ing]" any activity (Pet. 21), the decision below merely recognizes the lawfulness of the off-exchange futures and options contracts that professional traders have privately negotiated for many years. Indeed, petitioner asserted in the district court that "a ruling in this case affects only one person." (*See* n.10, *infra*.)

Third, there is no "wide divergence of views expressed by the federal government" as to the judgment below. (Pet. 17.) *All* federal agencies and departments rejected petitioner's interpretation of the Treasury Amendment, and *all* agreed that the facts of this case warranted affirmance of the district court's judgment for respondents.

Fourth, there is no conflict among circuits because, as the court of appeals observed, previous decisions address "*on exchange* trading on behalf of the general public, not individual, large-scale deals between professionals." (Pet. App. 21a.)

We are aware of no other case in which a party or agency has ever questioned the lawfulness under the CEA of foreign currency contracts negotiated privately between professional traders in off-exchange transactions. Petitioner, a long-time participant in off-exchange transac-

tions with respondent and many other firms, raised these issues for the first time in resisting payment of his contractual debt to respondents. The fact-bound application of settled principles by the courts below does not warrant further review.

A. Facts

Respondent Salomon Forex Inc, ("Salomon") is a foreign currency trading company with offices or affiliated operations in New York, London, Tokyo, and other leading foreign currency trading centers.[1] Petitioner Tauber is a prominent real estate investor and foreign currency trader whose net worth exceeds half a billion dollars. (Pet. App. 29a.)

Tauber has for many years engaged in foreign currency trading, both personally and through his wholly-owned trading company, Westwood Options, Inc. (which is a member of the nation's largest foreign currency option exchange.) (Pet. App. 3a, 29a.) During the past decade, he has personally engaged in billions of dollars' worth of off-exchange "futures" and option contracts not only with Salomon, but also with more than a dozen other leading foreign currency trading companies. (Pet. App. 3a.) These "off-exchange" contracts were not executed or traded on a board of trade or other organized exchange. (Pet. App. 30a, 35a.) Tauber pursued complex trading strategies, which included simultaneous "positions" with different trading firms that mutually limited the risk of one another. (*Id.*)

From 1989 to 1991, Tauber and Salomon negotiated more than 2700 off-exchange foreign currency "futures" and options contracts.[2] In the futures transactions, one

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[1] Respondents Salomon Brothers Inc, Salomon Inc, and Fred Gatling were third-party defendants in counterclaims filed by petitioner.

[2] Because the district court held that the contracts were excluded from CEA regulation by the Treasury Amendment, the court did

party promised to buy or sell a specified quantity of foreign currency at a certain price for delivery on a set date. In the options transactions, one party sold to the other for a cash fee the right (an "option") to buy ("call") or sell ("put") a specified quantity of foreign currency at a certain rate of exchange on an agreed-upon "exercise date." Each contract bound the parties to make or take delivery of currency. Although Tauber typically negotiated new, off-setting contracts to avoid the inconvenience of actually delivering or receiving foreign currency, he took delivery on at least four occasions. (Pet. App. 4a, 31a n.7.)

Salomon and Tauber negotiated the specific terms of every contract, usually in morning telephone calls. (Pet. App. 3a.) These contracts were a tiny part of the billions of dollars of off-exchange foreign currency futures and options transactions that are privately negotiated every day among professional foreign currency dealers and traders, banks, corporations, and governments.[3] This

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not reach Salomon's alternative arguments that the "futures" contracts were removed from CEA regulation under the statutory "cash forwards" exclusion for sales of "cash commodity for deferred shipment or delivery," *see* 7 U.S.C. §§ 1(a)(11), 6(a) and that the options were exempt "trade options," *see* 7 U.S.C. § 6c(b), (d).

Salomon and Tauber referred to their purchase-and-sale agreements as "forwards contracts." This is the term used in off-exchange markets for such transactions without regard to whether they would be classified as "futures" or "cash forwards" if they were subject to the CEA. *See, e.g., Abrams v. Oppenheimer Gov't Sec., Inc.*, 589 F. Supp. 4, 7 (N.D. Ill. 1983), *aff'd*, 737 F.2d 582, 590 (7th Cir. 1984). Here, we use the term "futures," as did the courts below, to refer to the contracts which the parties themselves called "forwards."

[3] *See, e.g.*, Federal Reserve Bank of New York, *Foreign Exchange Turnover Survey* (Sept. 13, 1989) (reporting $6.17 and $5.10 billion in average daily turnover in off-exchange foreign currency "forward contracts" and option contracts, respectively, in the United States). This and other surveys are discussed in the *amicus* brief of the Federal Reserve Bank of New York, Foreign Exchange Committee before the court of appeals. *See* Brief of the

round-the-clock, off-exchange market (sometimes called the "OTC," "interbank" or "interdealer" market) existed long before enactment of the CEA in 1974.[4] It affords participants the ability to negotiate contract terms suited to their individual needs and interests.

Privately-negotiated, off-exchange transactions are separate and distinct from the standardized foreign currency contracts that are traded "on-exchange," *i.e.*, on boards of trade and other regulated exchanges or contract markets.[5] Because on-exchange contracts have standardized terms (governing quantity, delivery, expiration date and credit support), they are readily tradable in secondary transactions regardless of the identity of the parties and they can be settled by automatic off-set or an exchange clearinghouse. Although the general public routinely participates in on-exchange trading, only sophisticated market professionals, backed by large assets, negotiate foreign currency futures and options in the off-exchange market.[6] The off-exchange market dwarfs the on-exchange

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Foreign Exchange Committee as *Amicus Curiae* in Support of Appellees at 10-12, *Tauber v. Salomon Forex Inc*, 8 F.3d 966 (4th Cir. 1993) (No. 92-1406) (hereinafter "Foreign Exchange Comm. *Amicus* Br.").

[4] In fact, the off-exchange foreign currency futures market dates to the 1870's. *See* Perkins, *The Emergence of a Futures Market in Foreign Exchange in the United States*, 11 Explorations in Economic History 193 (1974).

[5] For an overview of differences between on-exchange and off-exchange foreign currency transactions, see Committee on Futures Regulation, Association of the Bar of the City of New York, *The Evolving Regulatory Framework for Foreign Currency Trading* 13-17, 25-26 (Dec. 16, 1986) (hereinafter *Evolving Regulatory Framework*).

[6] *See* CFTC, *OTC Derivative Markets and Their Regulation* 124 (Oct. 1993) (hereinafter *1993 CFTC Report*). Salomon established a trading relationship with Tauber only after determining that he is an experienced foreign currency trader with an enormous net worth. (C.A. App. 81.) He is the only natural person with whom Salomon entered into foreign currency contracts. (Pet. App. 3a, 30a.)

market in the dollar volume of foreign currency futures and options transactions.

Salomon's individually-negotiated terms with Tauber required, among other things, that he maintain collateral to cover his potential losses. In September 1990, Tauber acknowledged his unsecured exposure to be approximately $24 million and promised to provide additional collateral. (Pet. App. 32a.) In succeeding months, the parties agreed to several interim measures to protect Salomon. Tauber did not comply with these agreements. (Pet. App. 32a.)

In July and August 1991, 68 foreign currency contracts came due under which Tauber owed Salomon $25.8 million. After he failed to honor his obligations, Salomon filed a one-count action for breach of contract in the United States District Court for the Eastern District of Virginia. Tauber responded with a myriad of defenses and counterclaims.[7] The only claim relevant here is his contention that his foreign currency contracts with Salomon were unenforceable because they were illegal under the CEA. Tauber had not previously asserted that position, nor (to our knowledge) has he questioned the lawfulness under the CEA of his contemporaneous off-exchange transactions (many profitable) with other foreign currency trading firms.

B. Statutory Background

The CEA regulates the trading of contracts for the purchase or sale of commodities for future delivery. *See* 7 U.S.C. §§ 1, *et seq.* The statute generally requires commodity futures and options trading to be conducted on a

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[7] Petitioner's 18 affirmative defenses and 11 counterclaims included allegations of fraud, unlawful "gambling," "bucketing," breach of fiduciary duty, duress, and breach of a duty to disclose material information relating to purported market manipulation. (Pet. App. 28a n.2.) In rejecting Tauber's claims, the district court characterized some of them as "ludicrous," "flatly silly," or inconsistent with his own admissions. (C.A. App. 21, 23, 24, 42.)

board of trade that is formally designated and regulated by the Commodity Futures Trading Commission ("CFTC") as an exchange or "contract market". *See* 7 U.S.C. §§ 6(a), 6c(b), *see also* 17 C.F.R. § 32.11(b).

Before 1974, the CEA regulated trading of futures in agricultural commodities. In that year, Congress enlarged the definition of "commodity" to include virtually all objects of futures trading, including foreign currency and other financial instruments. *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified as amended at 7 U.S.C. § 2). The 1974 Act also created the CFTC to regulate commodity futures and options trading. During Congress' consideration of these 1974 amendments, the Treasury Department became concerned that the new definition of "commodity," and the scheme of CFTC regulation, would embrace (and adversely affect) the important off-exchange markets for foreign currency and other financial instruments.

Consequently, the Treasury Department sent a letter to Congress urging that specified classes of off-exchange transactions be excluded from the CEA's coverage (and hence from CFTC regulation).[8] (The letter is included in the Appendix at p. 1a.) With one exception not relevant here, Congress adopted verbatim the language of the Treasury Department's proposal, thus enacting what is known as the "Treasury Amendment:"

> "Nothing in this [Act] shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii).

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[8] *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 49-51 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5887-89 (Letter from Acting General Counsel, Department of the Treasury, to Chairman, Senate Committee on Agriculture and Forestry (July 30, 1974)).

C. Proceedings Below

The district court rejected petitioner's defenses and counterclaims and granted summary judgment for Salomon. (Pet. App. 27a-44a.) In disposing of petitioner's "novel" CEA arguments (Pet. App. 28a), the district court relied on the plain language of the Treasury Amendment: "the foreign currency futures and options contracts between Tauber and Salomon Forex are not subject to regulation under the CEA because they were off-exchange 'transactions in foreign curency.'" (Pet. App. 43a.)

The court of appeals affirmed in a unanimous opinion. (Pet. App. 1a-26a.) It analyzed the ways in which the text, statutory context and legislative history of the Treasury Amendment manifested an intention to exclude from CEA regulation "all off-exchange transactions in foreign currency, including futures and options." (Pet. App. 17a.) The court of appeals then held that the foreign currency transactions between Salomon and Tauber plainly fell within the Treasury Amendment, because they were privately-negotiated and involved no offering to or participation by the general public of the sort characteristic of trading on an exchange.[9]

In rejecting the arguments of Tauber (and *Amici* commodity exchanges) that a ruling against him would allow unscrupulous dealers or "bucket shops" to ex-

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[9] Petitioner contended from the start of the litigation that the parties' contracts were entered off-exchange. He suggested for the first time in the court of appeals that Salomon might be deemed a "board of trade." The court of appeals declined to entertain that new theory. (Pet. App. 11a n.5.) The court of appeals' refusal to decide an issue never raised by petitioner in the district court is another strong reason why this case is *not* suited for further review. It should also be noted that both the CFTC and the Federal Reserve's Foreign Exchange Committee argued that Salomon was not a "board of trade" under accepted principles. (Brief for the CFTC as *Amicus Curiae* at 12-13, *Tauber v. Salomon Forex Inc*, 8 F.3d 966 (4th Cir. 1992) (No. 92-1406) (hereinafter "CFTC *Amicus* Br."); Foreign Exchange Comm. *Amicus* Br. at 27-29.) *See also Abrams*, 589 F. Supp. at 7.

ploit the general public, the court of appeals stressed that "[w]e hold only that individually-negotiated foreign currency options and futures transactions between sophisticated large-scale foreign currency traders"—such as the transactions at issue between Salomon and Tauber—"fall within the Treasury Amendment's exclusion from CEA coverage." (Pet. App. 22a.) Since the transactions in this case involved no trading with the general public, the parties were "not engaged in trading on an unregulated exchange, but . . . in off-exchange trading of the sort exempted from coverage of the CEA by the Treasury Amendment." *Id.* The court of appeals specifically rejected any broader reading of its holding, explaining that "[t]his case does not involve mass marketing to small investors, which would appear to require trading through an exchange, and our holding in no way implies that such marketing is exempt from the CEA." *Id.* (citation omitted).

REASONS FOR DENYING THE WRIT

Petitioner says that the Court should devote its limited resources to this case because the applicability of the Treasury Amendment to foreign currency futures and options is a question of "staggering" importance "on which the circuit courts, and the federal government itself, are deeply divided." (Pet. 14.) But the facts of this case do not support that claim.

No case of which we are aware has ever challenged the lawfulness under the CEA of privately-negotiated futures and options contracts between professional foreign currency traders. *Every* federal government *amicus* below disagreed with Tauber's interpretation of the Treasury Amendment and concurred that his transactions with Salomon were lawful. Tauber's petition seeks to obscure these points by focusing on cases involving the trading of standardized contracts with the general public by unregulated boards of trade.

I. THE FACTS OF THIS CASE DO NOT PRESENT THE BROAD QUESTION PRESSED BY PETITIONER

The court of appeals' holding is narrow and fact-bound. The court below ruled that, whatever the precise outer contours of the Treasury Amendment, it surely excludes from the CEA the particular foreign currency contracts here: "large-scale, customized, negotiated, bilateral transactions between sophisticated financial professionals." (Pet. App. 20a.) Indeed, petitioner himself stressed in the district court that "a ruling in this case affects only one person." [10]

The court of appeals' narrow holding does not present the broader issue that Tauber now asserts is of "staggering" importance: the extent to which the Treasury Amendment covers marketing of foreign currency futures and options contracts to the public outside regulated exchanges. Because this Court "reviews judgments, not statements in opinions," no further review of this case is warranted. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (internal quotation marks and citations omitted).

A. No Practical Consequences Warrant Review

There is no basis for Tauber's assertions that the decision below (i) "permits outright deregulation" of trading currently overseen by the CFTC (Pet. 21) and (ii) calls into question "whether trading must continue on regu-

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[10] Tauber's Memorandum in Support of Motion for Partial Summary Judgment at 12 (filed Feb. 28, 1992). Tauber contended that the Treasury Amendment did not apply to him as an individual because it only excluded from the CEA off-exchange contracts between institutional traders. *See also* Tauber's Reply to Salomon's Opposition; and In Support of His Own Motion for Partial Summary Judgment, at 2 (filed March 16, 1992): "The Treasury Amendment is a limited exception from the CEA's general exchange trading requirement . . . applicable only to banks and other financial institutions."

lated exchanges . . . for a tremendous volume of economic activity." (Pet. 13.) To the contrary, the off-exchange foreign currency market long predated the creation of the CFTC in 1974 and has continued side-by-side with the emerging trading of standardized contracts on the regulated exchanges.[11]

As both courts below found, the Treasury Amendment aimed to ensure that the important off-exchange market would continue unfettered by Congress' otherwise dramatic expansion of the CEA in 1974. (Pet. App. 17a-20a, 34a-36a).[12] Tauber's theory—not the decision below—would turn the existing regulatory situation upside down, by imposing new CFTC regulation on an off-exchange market that dwarfs on-exchange trading. Indeed, to eliminate any uncertainty caused by the *Tauber* litigation, the CFTC has issued rules confirming that privately-negotiated off-exchange foreign currency contracts among sophisticated traders are lawful.[13]

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[11] *See supra* note 4; *see also* Brief for the United States As *Amicus Curiae* at 4-8, *Tauber v. Salomon Forex Inc*, 8 F.3d 966 (4th Cir. 1992) (No. 92-1406) (hereinafter "United States *Amicus* Br."); *1993 CFTC Report* at 47-48.

[12] One study emphasizes that the off-exchange market

> "has expanded and evolved in response to changing business needs and circumstances to include investment banks, securities and commodities houses, pension funds, insurance companies, commodity pools, multinational corporations and sophisticated individuals, as well as its traditional commercial bank participants. Indeed, the Treasury Amendment was adopted, in part, to permit such growth and evolution to occur free from CFTC regulation." *Evolving Regulatory Framework* at 43.

[13] After the district court decision and briefing in the court of appeals, the CFTC (heeding statements of Congressional conferees) issued new regulations "to create legal certainty for a number of existing categories of instrument which trade today outside the forum of a designated contract market" as to which regulated exchange trading "may be unnecessary to protect the public interest and may create an inappropriate burden on commerce." 58 Fed.

It is implausible to assert that the decision below creates broad new opportunities for abusive, unregulated dealing in foreign currency futures and options. (Pet. 21-22). (The argument is also disingenuous, coming from a long-time professional trader in the established off-exchange market.) Participation in the off-exchange foreign currently market will continue to be limited to sophisticated and financially strong market participants such as banks and other institutional and professional traders.[14] There is no basis for concern that the judgment here will unleash marketing "by boileroom 'telemarketers' to unsophisticated members of the general public."

Reg. 5587, 5588 n.10 (1993), citing H.R. Rep. No. 978, 102d Cong., 2d Sess. 80 (1992).

The new rules expressly confirm the exclusion from CFTC regulation of specified transactions that "may be regarded as subject to the [CEA]," including privately-negotiated off-exchange "currency options" and "forward foreign exchange agreements" (to the extent they may be regarded as "futures") among professional traders and natural persons with total assets exceeding $10 million. 58 Fed. Reg. at 5588; 7 C.F.R. § 35.1. This demonstrates that Congress and the CFTC saw no basis for the concerns raised by Tauber but, on the contrary, wanted to confirm the lawfulness of off-exchange contracts. Since the regulation applies to all agreements entered after October 23, 1974, it also provides another ground for upholding the lawfulness of the parties' contracts in this case. (*Contrast* Pet. 4 n.2.)

[14] Tauber was able to negotiate futures and options contracts with other participants in the off-exchange market only because of his (1) experience in foreign currency trading; (2) access to "realtime" market information through his seat on the Philadelphia exchange and his personal access to "Telerate," a computerized quotation service; (3) maintenance of foreign bank accounts; and (4) large net worth, which allowed him to meet stringent collateral requirements and to enter into contracts of sufficiently large value to justify the expense of individualized negotiation. (Pet. App. 3a, 29a-30a). *See also* Hu, *Misunderstood Derivatives: The Causes of Informational Failure and the Promise of Regulatory Incrementlism* (Review Essay), 102 Yale L.J. 1547, 1465 & n.29 (1993) (noting that private individuals are generally unable to enter into OTC transactions in futures and options).

(Brief *Amicus Curiae* of the North American Securities Administrators Ass'n at 7.) The court of appeals warned that persons who attempt to engage in "mass marketing to small investors" will risk prosecution as unauthorized boards of trade. (Pet. App. 22a.)

This case, in sum, is not an appropriate vehicle for addressing the broad questions posed by Tauber. Those issues might be properly framed by a case questioning the CFTC's authority over the trading of foreign currency futures or options contracts with the general public. As the court of appeals observed with approval (Pet. App. 22a), another case recently confirmed the CFTC's regulatory authority in such circumstances, and we are aware of no decisions to the contrary. *CFTC* v. *Standard Forex, Inc.*, No. CV-93-0088 (E.D.N.Y., Aug. 9, 1993), *appeal dismissed.*[15] If a future court of appeals decision should actually raise the dangers hypothesized by Tauber, this Court will then have an appropriate factual context for determining whether the law needs clarification.

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[15] In *Standard Forex*, the CFTC sought to enjoin a firm operating an unregulated board of trade (a "bucket shop") and its officers from marketing standardized foreign currency futures contracts directly to the public. The CFTC alleged that the defendants sold foreign currency futures to Korean immigrants who in many cases did not speak English. *See Standard Forex*, slip op. at 12-15.

Granting the CFTC's application for a preliminary injunction and other relief, the district court rejected the defendants' claim that the Treasury Amendment excluded the transaction at issue from CFTC regulation under the CEA. *See id.* at 15-27. The court stressed, *inter alia*, that the district court's decision in the *Tauber* case "focused on an entirely different aspect of the [Treasury] Amendment" involving transactions that "occurred 'off-exchange.'" (Slip op. at 18.) The *Standard Forex* court also noted that the "unless" clause of the Treasury Amendment provides for regulation where marketing to the public creates a "formal structure" that is equivalent to a board of trade or exchange that is subject to CFTC regulation. *Id.* at 25.

B. There Is Unanimity in Government Views

Tauber also asserts that review by this Court is necessary because of a "wide divergence of views expressed by the federal government." (Pet. 17.) It is true that federal agencies have for many years taken differing positions on the full scope of the CFTC's regulatory powers. But *none* has concurred with Tauber's interpretation of the Treasury Amendment, and *all* have agreed that the contracts between Tauber and Salomon were lawful and enforceable on the facts of this case.

Thus the United States—on behalf of itself, the Department of the Treasury and the Securities and Exchange Commission—urged unqualified affirmance of the district court's judgment.[16] The Foreign Exchange Committee of the Federal Reserve Bank of New York agreed. (Foreign Exchange Comm. *Amicus* Br. at 14.)

The CFTC took a broader view of its regulatory authority than did the United States. But the Commission concluded that the district court's judgment (though not all of its reasoning) should be affirmed.[17] The CFTC

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[16] Taking issue with the same arguments petitioner asserts here, the United States stressed that "the Treasury Department's statutory interpretation has been in precise accord with the district court's interpretation of the reach of the Treasury Amendment . . . . 'All transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA.'" (United States *Amicus* Br. at 17 n.14.)

[17] The CFTC contended that the off-exchange futures contracts are valid as between traders (such as Salomon and Tauber) who are "within the class of banks, dealers and sophisticated and informed institutions" and that Tauber is a "'sophisticated foreign currency trader'" with long experience, vast assets, and his own foreign currency trading company. CFTC *Amicus* Br. at 17. The CFTC also argued that the "District Court Correctly Recognized On The Facts Of This Case That The Disputed [Option] Contracts Fall Within The Treasury Amendment" (*Id.* at 19).

also rejected Tauber's argument that the Treasury Amendment exclusion for "transactions in foreign currency" pertains only to actual transfers of currency itself. (CFTC *Amicus* Br. at 13.)

In his quest to find some conflict of views relevant to the facts of this case, Tauber cites—five times—a letter written by CFTC staff in a jurisdictional dispute with the SEC a year *after* the 1974 amendments to the CEA. (Pet. 9, 13, 18, 23, 25.) He mischaracterizes the letter as "the CFTC's contemporaneous interpretation of the 1974 Treasury Amendment." (Pet. 9.)[18] And his out-of-context quotations ignore the staff's express acknowledgment that the Treasury Amendment applies to off-exchange contracts.[19]

There is accordingly no basis for Tauber's assertion of a "wide divergence" of government agency views about the judgment at issue here. Since no government agency was even a party to this action, this case is a singularly inappropriate vehicle for resolving any supposed conflict in their positions.

C. There Is No Circuit Conflict Warranting Review

Tauber cites no case accepting his view that the Treasury Amendment applies only to transactions resulting in an actual delivery of foreign currency. Moreover, his

[18] Such contentions by staff personnel qualify as neither legislative history nor authoritative agency statements. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 627-28 (1971).

[19] The CFTC staff wrote:

> "The key word of the [Treasury Amendment] is 'unless' and 'unless' can have no other meaning than that the previously stated financial type instruments are subject to CFTC exclusive jurisdiction *when traded for future delivery on a board of trade*. When so traded, exclusive jurisdiction is crystal clear." SEC-CFTC Jurisdictional Correspondence, [1975-1977 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 20,117, at 20,834 (CFTC Staff Response, emphasis added).

claim of a supposed conflict among the circuits rests (once again) on an unduly broad reading of the decision below (Pet. 14-17). There is no conflict among the circuits because no court (and no regulatory agency) has ever found privately-negotiated, off-exchange transactions among professional foreign currency traders to be regulated under the CEA. Tauber accordingly bases his argument on decisions confirming that *trading of standardized foreign currency contracts* (and other Treasury Amendment instruments) with the *general public* must take place on a CFTC-regulated board of trade or exchange—a proposition with which the court below *agreed*.

The lack of any genuine conflict is illustrated by Tauber's repeated quotation of the Seventh Circuit's observation that futures and options trading "occurs in 'the contract,' not in the commodity." (Pet. 13, 23, quoting *Chicago Mercantile Exch.* v. *SEC*, 883 F.2d 537, 542 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).) That refers, of course, to the trading of standardized contracts conducted on or over an exchange,[20] and *not* to the off-exchange negotiation of contracts that "occurs in private transactions entered into directly by the counterparties . . . and are not secondarily traded." *1993 CFTC Report* at 74.

Tauber's reliance on the sharply split decision in *Board of Trade* v. *SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982), is four times removed from this case. *First*, there could be no circuit conflict because *Board of Trade* has been vacated and therefore has no precedential force.[21] *Second*, the case did not involve any

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[20] The exchange-traded contracts in *Chicago Mercantile Exchange* were "fungible because they have standard terms and each side's obligations are guaranteed by a clearing house." 883 F.2d at 542.

[21] The *Board of Trade* decision was vacated as moot when Congress specifically overruled the decision by amending the Securities Exchange Act to preserve the jurisdiction of the Securities and Exchange Commission ("SEC") over certain Government National

privately-negotiated, off-exchange transactions, but concerned competing jurisdictional claims by the CFTC and SEC over standardized Government National Mortgage Association ("GNMA") options that were being traded over exchanges. *Third*, the majority opinion turned not on the interpretation of the Treasury Amendment, but on another CEA provision granting the CFTC exclusive jurisdiction over transactions "involv[ing] contracts of sale . . . for future delivery." 677 F.2d at 1146. The court expressly declined to decide whether the Treasury Amendment affects the CFTC's jurisdiction over foreign currency options. *Id.* at 1155 n.34. *Fourth*, a later Seventh Circuit decision confirms (as did the court below) that the pertinent question under the Treasury Amendment is whether the contracts are privately negotiated off an exchange. *Abrams* v. *Oppenheimer Gov't Securities*, 737 F.2d 582, 590-92 (7th Cir. 1984).

Nor does *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242 (2d Cir. 1986) ("*ABT*"), conflict with the decision below. *ABT* rejected a Treasury Amendment defense presented by a self-styled (and unregulated) board of trade offering the general public standardized options contracts. As the court below correctly observed (Pet. App. 21a), *dicta* in *ABT* acknowledged the Treasury Amendment exclusion for off-exchange transactions between various financial institutions (an unduly narrow characterization), but held that the regulatory exclusion could in no event reach the marketing of unregulated options to the *general public*. 803 F.2d at 1249.[22]

Mortgage Association ("GNMA") and other securities options. *See* Memorandum for the Securities and Exchange Commission Suggesting Mootness 3, SEC v. Board of Trade, 459 U.S. 1026 (1982) (No. 82-526); *see also Golden Nugget, Inc.* v. *American Stock Exch., Inc.*, 828 F.2d 586, 589 (9th Cir. 1987) (discussing legislative history of 15 U.S.C. § 78i(g)).

[22] It should also be noted that *ABT* endorsed the CFTC's contention in that case (and below) that *exercised* foreign currency

II. THE DECISION BELOW IS CORRECT

The court of appeals stressed that the privately-negotiated foreign currency futures and options contracts between the two professional foreign currency traders here present the clearest case for application of the Treasury Amendment's exclusion from CEA coverage. (Pet. App. 22a.) This is undoubtedly correct. No matter what debate there may be about the CEA's application to the broader marketing and trading of futures and options contracts, the text and legislative history of the Treasury Amendment establish that Congress intended privately-negotiated foreign currency transactions among professionals in the off-exchange market to be excluded from regulation under the CEA.

1. As both the district court and the court of appeals found, the text of the Treasury Amendment is clear and unambiguous. It provides in relevant part:

> "Nothing in [the CEA] shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii).

Because the foreign currency contracts between Salomon and Tauber were *not* "conducted on a board of trade" (Pet. App. 35a), those transactions are excluded from CEA coverage by the plain language of the Treasury Amendment.

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options, such as those at issue here (Pet. App. 41a), are completed transactions in foreign currency that are excluded from CEA regulation under any view of the Treasury Amendment. The *ABT* court observed, without regard to whether there is ever an actual delivery of currency, that a foreign currency option contract "does not become a 'transaction in' that currency unless and until the option is exercised." 803 F.2d at 1248. Both the CFTC and the United States urged this principle before the court of appeals as an alternative ground for affirming the district court's judgment in this case because the options were exercised. *See* CFTC *Amicus* Br. at 19-20; United States *Amicus* Br. at 23-24.

2. The legislative history of the Treasury Amendment confirms that the decision below is correct. As the Treasury Department wrote when it proposed the amendment:

> "The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency. . . . The participants in th[e] [dealer] market are sophisticated and informed institutions, unlike the participants on organized exchanges, which, in some cases, include individuals and small traders who may need to be protected by some form of governmental regulation . . . . [N]ew regulatory limitations and restrictions could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." (pp. 1a-2a, *infra.*)

The Senate Committee on Agriculture and Forestry focused precisely on a regulatory exclusion for "foreign currency and certain enumerated financial instruments unless such trading is conducted on a formally organized futures exchange." [23] And petitioner is simply wrong in asserting that congressional committees avoided "any reference to futures" in their comments on the Treasury Department's proposed amendment.[24] Because Tauber's

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[23] S. Rep. No. 1131, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5863. The Senate Report mentions foreign currency *futures*, and does not refer to *options*, because foreign currency options trading arose after the Treasury Amendment was enacted in 1974. *See, e.g., Evolving Regulatory Framework* at 56 (explaining that off-exchange foreign currency options should be covered by the Treasury Amendment); Chrystal, *A Guide to Foreign Exchange Markets*, Fed. Reserve Bank of St. Louis Rev. 10 (March 1984) (options were a "new feature of foreign exchange markets that [arose] in the 1980's.") The Board of Governors of the Federal Reserve regards the Treasury Amendment as covering off-exchange "futures, and currency options transactions as well." Letter from Board of Governors to CFTC at 2 (March 5, 1986).

[24] *See* S. Rep. No. 93-1131, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. at 5887: "in a letter to the [Senate] Committee [on Agriculture and Forestry] . . . the Department of the Treasury recommended that a provision be included in the legislation ex-

transactions with Salomon were privately negotiated and did not occur on any exchange, the court below correctly held that these transactions were covered by the Treasury Amendment and thus were not prohibited by the CEA.

3. Tauber's "textual" interpretation of the Treasury Amendment was rejected as implausible and mischievous by all federal government *amici*, each of which is familiar with the foreign currency markets.[25] The construction offered in the petition never occurred to Tauber during his many years of off-exchange trading of foreign currency futures and options with Salomon and others, and did not dawn on him until his appeal to the Fourth Circuit.[26] The court of appeals arrayed many clear and compelling reasons for rejecting Tauber's textual arguments (Pet. App. 15a-19a), and there is no reason to repeat them here.[27]

4. Congress did not distinguish among different types of foreign currency transactions when it adopted the Treasury Amendment. Its broad language excludes *all* privately-negotiated off-exchange transactions from CEA regulation. Tauber's attempt to read the Amendment as covering only those transactions that actually result in the delivery of foreign currency is unprecedented and incompatible with the way the foreign currency markets have long operated under the law.

Thus, at the broadest level, Tauber's interpretation ignores the vast off-exchange market, consisting of privately-negotiated futures and options transactions rarely resulting

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empting, from regulation by the Commission, foreign currency futures trading other than on organized exchanges."

[25] United States *Amicus* at 19-20; CFTC *Amicus* Br. at 13; Foreign Exchange Comm. *Amicus* Br. at 15-25.

[26] *See* note 10, *supra*.

[27] Tauber now argues that 7 U.S.C. § 6c(f) somehow shows that options trading must "take place on a regulated exchange." (Pet. 24.) To the contrary, the provision confirms that the SEC (not the CFTC) has jurisdiction over *on-exchange* trading of such options on a *securities* exchange.

in delivery, that has never been regulated by the CFTC. Nor does Tauber's "actual delivery" gloss satisfactorily explain why the broadly-worded Treasury Amendment was necessary to confirm what has always been a central principle of the CEA—that contacts for actual or deferred delivery of a commodity are not subject to regulation as futures or options.[28] And carrying the point further, Tauber's interpretation cannot account for—and would sweep under CFTC regulation—the enormous volume of off-exchange "spot" transactions that do not (and are not intended to) result in any delivery of foreign currency. *See Bank Brussels Lambert, S.A.* v. *Intermetals Corp.*, 779 F. Supp. 741, 748-50 (S.D.N.Y. 1991).

Thus, by focusing on actual delivery of currency as triggering the Treasury Amendment, petitioner would not only make it redundant of the existing statutory exclusions, but actually would *expand* regulation over important classes of transactions that would be excluded even if the Treasury Amendment had never been enacted. That is only one perverse consequence of Tauber's "textual" interpretation of a statutory amendment that was enacted not to *broaden* regulation under the CEA, but to declare sweepingly that "[n]othing in [a statute regulating trading of futures and options contracts] shall be deemed to govern or in any way be applicable to transactions in foreign currency" that would otherwise be regulated.

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[28] There is not a shred of legislative history hinting that the "real" purpose of the Treasury Amendment was to prevent the CFTC from regulating *cash* foreign currency transactions. (*See* Pet. 25.) The Treasury Department's letter is to the contrary, and there would have been many simpler and narrower ways to address the point if that had been the objective.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 17, 1994

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APPENDICES

APPENDIX A

The General Counsel Of The Treasury,
Washington, D.C., July 30, 1974.

Hon. Herman E. Talmadge,
Chairman, Committee on Agriculture and Forestry,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: The attention of the Department has been directed to H.R. 13113, S. 2485, S. 2578 and S. 2837, bills to regulate future trading in agricultural and other commodities, which are currently pending before your Committee.

Each of these bills would estabilsh a Federal regulatory agency with sweeping authority to regulate futures trading in virtually any commodity, good, article, right or interest. This authority would extend to the regulation of futures trading in foreign currencies. Moreover, H.R. 13113 and S. 2578 would amend the Commodity Exchange Act, 7 U.S.C. Sec. 1, *et seq.*, to subject futures trading in foreign currencies to the regulatory requirements of that Act.

The Department believes the bills contain an ambiguity that should be clarified. The provisions of the bills do not clearly indicate that the new regulatory agency's authority would be limited to the regulation of futures trading on organized exchanges, and would not extend to futures trading in foreign currencies off organized exchanges. We do not believe that either the House of Representatives or your Committee intends the proposed legislation to subject the foreign currency futures trading of banks or other institutions, other than on an organized exchange, to the new regulatory regime.

The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency. Virtually all futures

trading in foreign currencies in the United States is carried out through an informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign exchange rate movements. The participants in this market are sophisticated and informed institutions, unlike the participants on *organized* exchanges, which, in some cases, include individuals and small traders who may need to be protected by some form of governmental regulation.

Where the need for regulation of transactions on other than organized exchanges does exist, this should be done through strengthening existing regulatory responsibilities now lodged in the Comptroller of the Currency and the Federal Reserve. These agencies are currently taking action to achieve closer supervision of the trading risks involved in these activities. The Commodity Futures Trading Commission would clearly not have the expertise to regulate a complex banking function and would confuse an already highly regulated business sector. Moreover, in this context, new regulatory limitations and restrictions could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors.

Section 201 of H.R. 13113 currently contains broad language that would appear to authorize the new agency to regulate bank foreign currency departments. Section 201 provides that the new Commodity Futures Trading Commission would have "exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade, contract market or on any other board of trade, exchange, or market." The bill would amend the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, to broaden the definition of commodity to include all goods, articles, services, rights and interests

"in which contracts for future delivery are presently or in the future dealt in." (Section 201). Since this definition would encompass foreign currencies, it seems clear that the language of the bill would give the Commission authority to regulate futures trading in foreign currencies by banks. Moreover, the language "or any other board of trade, exchange, or market" is sufficiently broad to authorize the Commission to regulate trading in foreign currencies by banks in the over-the-counter market.

S. 2837, S. 2485 and S. 2578 are also, in our view, unclear whether they would authorize the regulation of futures trading in foreign currencies by banks. For example, section 301 of S. 2837 provides that it "is unlawful for any person to buy or sell, or offer to buy or sell, any futures contract except on an exchange registered under section 201." Section 201(a) provides that it is unlawful for an exchange to permit futures contracts to be traded on it unless the exchange is registered with the Futures Exchange Commission. A futures contract is defined as "an agreement to buy or sell for delivery at a future time any specified quantities of goods, services, or other tangible or intangible things." (Section 102(3)). This definition is broad enough to include futures contracts in foreign currencies. The term "exchange" is defined broadly to mean "any place where futures contracts are traded." (Section 102(10)).

Accordingly, S. 2837 could be construed to prohibit banks from engaging in futures trading in foreign currencies unless they registered as an exchange with the new Futures Exchange Commission and became subject to its regulation. We believe that this is a serious defect in the proposed legislation that would, if enacted, impair the usefulness and efficiency of our foreign exchange markets.

In addition, the Department is concerned that the language of the bill is broad enough to subject to regulation by the proposed futures trading regulatory agency a wide

variety of transactions involving financial instruments, such as puts and calls, warrants, rights, resale of installment loan contracts, repurchase options in Government securities, Federal National Mortgage Association mortgage purchase commitments, futures trading in mortgages contemplated by Federal Home Loan Mortgage Corporation, etc. We feel that regulation of these transactions, which generally are between large, sophisticated institutional participants, is unnecessary, and could be harmful. For this reason, we do not believe it is contemplated that the bills should regulate transactions in financial instruments of that nature.

In view of the foregoing, we strongly urge the Committee to amend the proposed legislation to make clear that its provisions would not be applicable to futures trading in foreign currencies or other financial transactions of the nature described above other than on organized exchanges. This could be accomplished by inserting a new section at an appropriate place reading as follows:

"Sec. —. Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, re-purchase options, government securities, mortgages and mortgage purchase commitments, or in puts and calls for securities, unless such transactions involve the sale thereof for future delivery conducted on a board of trade."

The Department has been advised by the Office of Management and Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

Donald L. E. Ritger.
Acting General Counsel.

APPENDIX B

SALOMON INC SUBSIDIARIES

Phibro Energy AG
- Phibro Energy Futures Limited
- Phibro Energy (Asia) Pte. Ltd.
- Phibro Energy Trading AG
- Scanports Shipping Ltd.

Phibro Energy Clearing, Inc.
Phibro Energy Commodities Limited
- Phibro Energy Marketing Limited

Phibro Energy International Ltd.
Phibro Energy International Sales Corp.
Phibro Energy Oil, Inc.
Phibro Energy Production, Inc.
- Phibro Energy International Oil Company, Inc.
- White Nights Joint Enterpirse (38.75% owned)

Phibro Energy Trading Pte. Ltd.
Phibro Energy USA, Inc.
- Phibro Gas Properties, Inc.
- Moss Bluff Gas Storage Systems (50% owned)
- Phibro Gas Resources, Inc.
- Questor Drilling Corp.

Philipp Brothers, Inc.
Philipp Brothers Ltd.
Scanports Shipping, Inc.
Salomon Brothers Holding Company Inc
- Loan Participation Holding Corporation
  - Home Mortgage Access Corporation
    - Home Mac Government Financial Corporation
    - Home Mac Government Financial Corporation West
    - Home Mac Mortgage Securities Corporation
- PB-SB Investments Inc.
- PB-SB Ventures Inc.
- Salomon International Finance AG
- Salomon Brothers Asia Ltd.
- Salomon Brothers Overseas Inc.

Salomon Brothers Europe Ltd.
- Salomon Brothers International Limited
- Salomon Brothers U.K. Limited
- Salomon Brothers U.K. Equity Limited
- The Mortgage Corporation Group Limited
  - The Mortgage Corporation Limited

Plaza Clearing Corporation
Salomon Brothers Asset Management Inc.
Salomon Brothers Australia Limited
Salomon Brothers Canada Holding Co.
Salomon Brothers Finanz AG
Salomon Brothers Hong Kong Limited
Salomon Brothers Inc
- Salomon Brothers International, Inc.

Salomon Brothers Mortgage Securities, Inc.
Salomon Brothers Mortgage Securities II, Inc.
Salomon Brothers Mortgage Securities III, Inc.
Salomon Brothers Mortgage Securities V, Inc.
Salomon Brothers Mortgage Securities VI, Inc.
Salomon Brothers Mortgage Securities VII, Inc.
Salomon Brothers Pacific Holding Company Inc.
Salomon Brothers Properties, Inc.
- Broadwater Corp.
- Salomon Brothers Investments Inc.
- SB Financing Corp.

Salomon Brothers Realty Corp.
Salomon Brothers Real Estate Development Corp.
Salomon Brothers Receivables Inc.
Salomon Brothers S.A.
Salomon Capital Access for Savings Institutions, Inc.
- Salomon Capital Access Corporation

Salomon Forex Inc
- Salomon Brothers Finance Corporation

Salomon Plaza Holdings Inc.
- Plaza Holdings, Inc.
  - Salomon Brothers Financial Corporation & Co. beschrankt haftende KG
  - Salomon Brothers AG

Salomon Brothers Kapitalanlagegsellschaft mbH
Salomon Brothers Services GMBH
Salomon Swapco Inc.
SB/DP Participation Corp.
SB/EJV Participation Corp.
SB/OT Participation Corp.
SBSIM, spa
The S.W. Shattuck Chemical Co., Inc.